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SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde

Registrar: Lovemore G. Munlo, SC

Date filed: 21 November 2006

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

PUBLIC

KANU – DEFENCE RESPONSE TO PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION ON CONFIDENTIAL MOTION TO CALL EVIDENCE IN REBUTTAL

Office of the Prosecutor:
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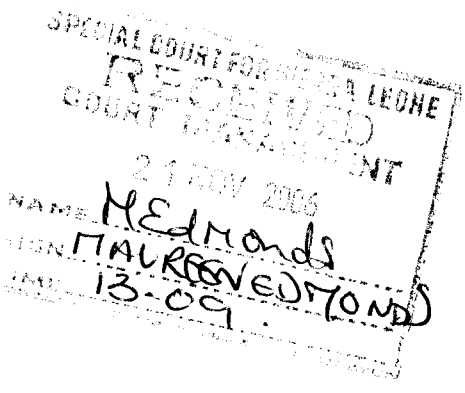

The defence in the *Kanu* case herewith files its response to the "Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal" of 17 November 2006.

Sub exceptional circumstances

1. While acknowledging that the Trial Chamber has a clear discretion under Rule 85(A)(iii) to allow or preclude the presentation of rebuttal evidence, the Prosecution holds that nonetheless, exceptional circumstances would exist justifying an appeal in the instant case.

2. By way of preliminary remark it should be stressed that the application of the Trial Chamber of this discretionary power, within the legal parameters as set out by both the ICTY and ICTR jurisprudence, does not in itself constitute exceptional circumstances within the meaning of Rule 73(B). The circumstances on which the Prosecution relies in its application for leave to appeal, can in view of the Defence not change this observation. In the following sub sections, the Defence will further elaborate on these circumstances.

3. On the basis of the Trial Chamber I decision of 28 April 2005,[1] it can be said that the question raised by the Prosecution in its application in itself does not relate to a general principle to be decided for the first time or a question of public international law importance which further argument or decision at the appellate level would be conducive to the interests of justice or is one that raises serious issues of fundamental legal importance to the SCSL. Rather, the question put before the Honourable Trial Chamber by the Prosecution in the instant case relates to a question of fact and the determination of discretionary powers applied by the Trial Chamber on a factual issue, namely the question whether the Prosecution in all reasonableness could have anticipated certain defence issues and whether these

[1] See Prosecutor v. Sesay, Kallon and Gbao, SCSL-0415-T-357, "Decision on defence application for leave to appeal ruling of the 3rd of February 2005, on the exclusion of statement of Witness TF1-141", 28 April 2005. par.-25-26, quoted by the Prosecution in its appeal application of 17 November 2006 in paragraph 5.

issues are decisive for the outcome in terms of guilt or innocence for the particular accused.

4. In this regard, it can be observed that the three sections with the circumstances relied on by the Prosecution in its application,[2] do not by itself mention *expressis verbis* any of the mentioned "general principles" or "questions of public international law importance" or any other "serious issues of fundamental, legal importance to the Special Court for Sierra Leone." Trial Chamber I in its decision of 28 April 2005 in specific, interpreting the question what to understand about a serious issue of fundamental legal importance, referred to "some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems."[3] Also here, the prosecution in its application failed to delineate any issue which merits this qualification. Already for this reason, the Prosecution application should be denied. In the alternative, the Defence raises the following arguments with respect to the respective circumstances raised by the Prosecution.

Sub general circumstances

5. In paragraph 8, the prosecutor canvasses the argument that the Trial Chamber's application of the law is so stringent that rebuttal evidence in practice would never be permitted. However, the Trial Chamber relied on the existing criteria for rebuttal evidence as developed by the ICTY.[4]

6. A cautious approach on part of the Prosecution in preparing its witness list, or even "an overcautious approach"[5] seems in line with the burden of proof resting on the

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[2] See paras. 8-15 of *Prosecutor v. Brima et al.*, Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal, 17 November 2006, Case No. SCSL-2003-16-T-584.
[3] Ibid., para. 26.
[4] See *Prosecutor v. Brima et al.*, Decision on Confidential Motion to Call Evidence in Rebuttal, 14 November 2006, Case No. SCSL-2003-16-T-582, Section B and *Prosecutor v. Brima et al.*, Confidential Kanu Defence Response to Prosecution Motion for Leave to Cal Evidence in Rebuttal, 19 October 2006, Case No. SCSL-2003-16-T-574.
[5] See *Prosecutor v. Brima et al.*, Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal, 17 November 2006, Case No. SCSL-2003-16-T-584, para. 9.

prosecution. Furthermore, the danger of "an avoidable consumption of time" (para. 9 prosecution application) in itself may not be an argument for the prosecution not to anticipate defence arguments.

7. With respect to the arguments of the Prosecution in paragraph 10 of its application, the defence's interprets the Trial Chamber's decision that it is the combination of the following two factors that led the Honourable Trial Chamber to refuse the introduction of rebuttal evidence:

(1) the analysis that the Prosecution, in view of the Trial Chamber, already adduced evidence relevant to the issues at hand;

(2) the analysis that the Prosecution could previously reasonably have foreseen that these matters would be an issue so that it reasonably had had an adequate opportunity to address these subjects during its case.

Based on these two factors and the combination thereof, it can be said that the Prosecution has had an adequate opportunity to address these issues.

Sub first category of evidence

8. The arguments of the Prosecution in paragraph 12 seems to negate that the Trial Chamber observed in Section C of its Decision that both in the pre-trial brief of the Brima Defence team and the remarks of defence counsel for Mr. Brima, at the beginning of the case, notice of alibi defence was provided. Accordingly, the rationale of rule 67(A)(ii)(a) was met and thus the Trial Chamber was not obligated to distinguish the situation the situation that no, or no adequate notice of an alibi defence was provided from other situations.

9. As a result, the Prosecution's observation that in this regard its responsibility to seek particulars would "completely" be shifted to the Prosecution, has no merit.[6] If one were to accept that the Defence in the Brima case put the Prosecution on notice

[6] See para. 13 Prosecution application.

of an alibi defence so that at the least the rationale of rule 67(a)(ii)(a) is met, such a situation can not be qualified as a form of "penalisation" of the Prosecution by not allowing it to rebut certain evidence.[7]

Sub Second category of evidence

10. With respect to paragraph 15 of the Prosecution application the defence holds that:

- The question of payments to Prosecution witnesses was addressed by the Defence during the Prosecution case. Most prosecution witnesses were questioned about the remunerations for their testimonies. In March 2005, the Defense even filed a motion to this extent in order to obtain disclosure on these payments.[8] At the least it was implicitly clear for the Prosecution that the issue would be raised that witnesses were paid to testify against the accused and thus foreseeable.
- The issue of signing a ledger does not fall within the criteria of allowing rebuttal evidence. In particular, it does not comply with the criterion that the evidence to the accused in rebuttal is decisive for the determination of guilt or innocence of the particular accused.

In conclusion

The defence respectfully prays the Honourable Trial Chamber to refuse the Prosecution application since no irreparable prejudice will be caused on part of the Prosecution.

Respectfully submitted,
On 21 November 2006

G.-J. Alexander Knoops

[7] See para. 13 Prosecution application.
[8] See *Prosecutor v. Brima et al.*, Kanu – Motion to Disclose Prosecution Materials and/or Other Information Pertaining to Rewards Provided to Prosecution Trial Witnesses, March 4, 2005, SCSL-2004-16-PT-166.

TABLE OF AUTHORITIES

Prosecutor v. Sesay, Kallon and Gbao, SCSL-0415-T-357, "Decision on defence application for leave to appeal ruling of the 3rd of February 2005, on the exclusion of statement of Witness TF1-141", 28 April 2005, par. 25-26.

Prosecutor v. Brima et al., Decision on Confidential Motion to Call Evidence in Rebuttal, 14 November 2006, Case No. SCSL-2003-16-T-582, Section B.

Prosecutor v. Brima et al., Confidential Kanu Defence Response to Prosecution Motion for Leave to Cal Evidence in Rebuttal, 19 October 2006, Case No. SCSL-2003-16-T-574.

Prosecutor v. Brima et al., Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal, 17 November 2006, Case No. SCSL-2003-16-T-584.

Prosecutor v. Brima et al., Kanu – Motion to Disclose Prosecution Materials and/or Other Information Pertaining to Rewards Provided to Prosecution Trial Witnesses, March 4, 2005, SCSL-2004-16-PT-166.